

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT -II**

IA No. 1403/2022

In

C.P. (IB)No.298/MB/2018

Under Section 60(5) of Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016

UV Asset Reconstruction Company Limited

Having address at- 704, 7th Floor, Deepali Building, 92, Nehru Place, New Delhi- 110019

.... Applicant No. 1

UV Stressed Assets Management Private Limited

Having address at- 704, 7th Floor, Deepali Building, 92, Nehru Place, New Delhi- 110019

.... Applicant No. 2

Versus

Aircel Limited

(Through its Monitoring Committee)

Having address at- OPUS Centre, 47, Central Road Opposite Tunga Paradise, MIDC, Andheri East, Mumbai, Maharashtra- 400093

.... Respondent

In the matter of

Aircel Limited

Order Delivered on :- 21.12.2023

Coram:

Mr. Anil Raj Chellan
Member (Technical)

Mr. Kuldip Kumar Kareer
Member (Judicial)

Appearances:

For the Applicant : Senior Adv. Pradeep Sancheti a/w Adv. Shaivi Bhamaria

For the Respondent : Senior Adv. Gaurav Joshi a/w Adv. Kriti Kalyani

ORDER

Per: -Anil Raj Chellan, Member Technical.

1. The present interlocutory application is filed by UV Asset Reconstruction Company Ltd, the Applicant No. 1 who is the successful Resolution Applicant along with UV Stressed Assets Management Private Limited, the Applicant No. 2 under Section 60 (2) of the Insolvency and Bankruptcy Code, 2016 ('the Code') seeking the approval of the Adjudicating Authority to carry out certain modification in the Resolution Plan submitted by Applicant No. 1 in respect of Aircel Limited ('Corporate Debtor') and approved by the Adjudicating Authority vide its order dated 09.06.2020 ('Approval Order').
2. By way of this application, the Applicant No. 1 seeks the leave of the Adjudicating Authority to nominate Applicant No. 2 in place of Applicant

No. 1 in the Resolution Plan for the purpose of implementation of the approved Resolution Plan for the reasons stated in the petition.

Brief facts leading to the filing of the present Application are set out as under:-

3. On 28.02.2018, Aircel Limited, Dishnet Wireless Limited and Aircel Cellular Limited (3 different companies under the same group, collectively referred to as 'Aircel Entities') owing to financial difficulties had filed separate applications under Section 10 of the Code before the Adjudicating Authority/this Tribunal. The Petition concerning Aircel Limited was admitted vide order of the Tribunal dated 12.03.2018 whereas the petitions concerning Dishnet Wireless Limited and Aircel Cellular Limited were admitted by vide order dated 19.03.2018. Mr. Vijay Kumar Iyer was the common Resolution Professional in respect of all the Aircel Entities and the CIRP was commonly undertaken for the Aircel Entities, on a comprehensive basis at a group level, owing to the inter-connected nature of the business of each of the Aircel Entities. The constitution of the Committee of Creditors (CoC) for the three Aircel Entities was also identical, except that Standard Chartered Bank was an additional Financial Creditor in respect of Aircel Limited.
4. Pursuant to the initiation of CIRP, in respect of the Aircel Entities, the Applicant No. 1 had submitted three distinct, yet parimateria Resolution Plans in respect of each such entity, given the substantial inter weave and inter dependence in their business and commonalty of assets.

5. Another entity namely Eight Capital Advisory Services Private Limited had submitted a Resolution Plan which was subsequently withdrawn, leaving the plans submitted by the Applicant No.1 as the only compliant Resolution Plan received in respect of the Aircel Entities. On 13.05.2019, the CoC approved the Resolution Plan submitted by Applicant No. 1 in respect of Aircel Limited by a majority of 73.88%. The Adjudicating Authority also approved the Resolution Plans submitted by the Applicant No. 1 vide a composite Order dated 09.06.2020 (Approval Order).
6. The approved Resolution Plans inter alia envisaged equity subscription of an aggregate sum of Rs. 11 crores by Applicant No. 1 in the new share capital of the Aircel Entities. The Applicant No. 1 was to subscribe to 76% of the equity share capital of the Aircel Entities while the balance 24% was to be held by Financial Creditors against conversion of unsustainable portion of their debt. In lieu of the sustainable portion of the debt due to Financial Creditor, Zero Coupon Optionally Convertible Debentures (ZCOCDs) are to be issued. These ZCOCDs were to be redeemed over a period of five years out of internal accruals and sale of certain assets. The outstanding ZCOCDs, if any, at the end of five years were envisaged to be converted into equity in a way that Financial Creditors would hold 74% and Applicant No. 1 would hold 26% of the paid-up share capital.
7. The Resolution Plans approved by the Tribunal stipulated that the Resolution Applicant being an asset reconstruction company licensed to operate as such, requires approval of the RBI for acquiring shares of the Corporate Debtor as also for the transactions contemplated in the Resolution Plans. The Resolution Applicant, the Applicant No. 1 is required to apply for such

approval post approval date, but before Effective Date. (as defined in the Plans)

8. The Applicant approached RBI vide several letters and continued to liaison with RBI. However, RBI refused to accede to the request of Applicant No. 1 and issued a show cause notice dated 12.11.2020 to the Applicant No.1 seeking cancellation of the certificate of Registration granted to Applicant No. 1 under SARFAESI Act. The said show cause notice was challenged by the Applicant No. 1 before the Hon'ble Delhi High Court under a Writ Petition wherein notice had been issued and an order of stay on the show cause notice was granted, and this interim order continues to operate till date. In the said Writ Petition, RBI has taken a clear stance that asset reconstruction companies are not permitted under the extant regime to act as Resolution Applicant.
9. The Approval Order is also under challenge before the Hon'ble NCLAT in several appeals filed by the creditors of the Aircel Entities. Further, a decision of Hon'ble NCLAT regarding trading of right to use spectrum as a part of the Resolution Plan is also under challenge before the Hon'ble Supreme Court.
10. In the circumstances, the Applicants filed the present Application.

Submissions of the Applicants:-

11. The Applicant submitted that it has left no stone unturned for acquiring the requisite approval from RBI to comply with clause 5.14.2 in each of the Resolution Plans to be able to implement the Resolution Plans. However,

despite its earnest efforts, the Applicant No. 1 has thus far not been able to secure the RBI approval.

12. The persistent stand of RBI on the issue of granting approval to Applicant No. 1 to act as the Resolution Applicant in relation to Aircel Entities in the manner specified in the Resolution Plans made it completely impossible for the Applicant No. 1 to take steps in furtherance of the Resolution Plans.
13. The requirement to effect an expedited sale of the assets assume extreme significance in view of the fact that some of the assets such as equipment and machinery have a high rate of obsolescence, as a result whereof the rate of depreciation is rapid. Such erosion of value is faster when such machine and equipment do not remain in use and are allowed to idle. The Counsel contended that the assets of the Corporate Debtor have been lying idle from February, 2018, the date of filing of Insolvency Application. Similar is the case with the 14,500 kms of optical fibre cable laid by the Aircel Entities across the country. In addition to machine, equipment and fibre network, the Resolution Plans also aim to monetise other identified assets. The monetisation of assets can only be taken from the Effective Date as defined under the Resolution Plans i.e. 5 business days from the grant of approval by RBI.
14. The inordinate delay and uncertainty in receiving RBI's approval has led to the filing of the present application. The Applicant No. 1 proposes that the equity subscription in the Aircel Entities be carried out through an alternate entity, that is Applicant No. 2 in place of Applicant No.1. This decoupling of

equity subscription would entail deletion of clause 5.14.2 in each of the 3 Resolution Plans which mandated RBI's approval.

15. The Counsel for the Applicant further submitted that clause 9.3.4 (b) provides for addressing this kind of situations with the approval of the Adjudicating Authority. As such, the only viable and pragmatic solution to current impasse is that the Applicant should be allowed to nominate to effectuate the Resolution Plan instead of itself. It is submitted that the alternate entity, the Applicant No. 2, is not hit by the restrictions contained in Section 29A of the Code.
16. The Counsel further submitted that no modification in the commercial terms of the approved Resolution Plans is proposed and as such no prejudice would be caused to the creditors and other stakeholders in the Resolution process of the Aircel Entities.

Submissions of the Respondent, the Monitoring Committee:-

17. The Learned Senior Counsel for the Monitoring Committee submitted that as per the provisions of the approved Resolution Plan, the Monitoring Committee of the Corporate Debtor has been constituted and members of the Monitoring Committee have conveyed their no objection to the present application in as much as the Applicant No. 1 has sought to be substituted by the Applicant No. 2 in the process of implementation of the approved Resolution Plan.

Analysis and Decision:-

18. We have heard the Ld. Senior Counsels appearing for the parties in detail and perused the documents on record.
19. The Counsel for the Applicants submitted that the Applicant No.1 being an Asset Reconstruction Company, registered and licensed under Section 3 of the SARFAESI Act, requires the approval of RBI to act as Resolution Applicant under the Code, and therefore, it took arduous efforts by way of writing various e-mails, liasoning with the senior officials of RBI, following up through the Associations of Asset Reconstruction Companies in India, and making industry wide representations on the issue of allowing Asset Reconstruction Companies licensed under Section 3 of the SARFESI Act to acquire the RBI approval. Despite their efforts, RBI not only refused to accede to the request of the Applicant No.1 but also initiated action to cancel the certificate of registration granted to Applicant No.1. This led to the filing of a writ petition by the Applicant No.1 before the Hon'ble High Court of Delhi against the show cause notice issued by RBI, and the Hon'ble High Court was pleased to grant a stay on show cause notice, but the matter is still *sub judice*.
20. It is also submitted that RBI, vide its Master Circular on Asset Reconstruction Companies dated April 03, 2023 granted permission under Section 10 (2) of the SARFAESI Act to ARCs who fulfil the conditions specified therein to

undertake the activity as a resolution applicant under the Code. Even after issue of the amended Master Circular dated April 03,2023, RBI appears to have not changed its stance and is vigorously contesting the writ petition filed by the Applicant No.1 which is pending before the Hon'ble Delhi High Court. Incidentally, the Applicants have not specifically contended that the above change /modification in the Master Circular issued by RBI made them eligible to act as resolution applicant.

21. The Senior Counsel for the Applicants also brought to our notice various provisions contained in the Resolution Plans to demonstrate that the approval of RBI is a pre-requisite for implementation of the Resolution Plan. The requirement of obtaining the approval/permission of RBI for Applicant No.1 to act as Resolution Applicant and/or to implement the Resolution Plan being an admitted fact, we do not consider it necessary to elaborate or reproduce herein the various provisions of the Resolution Plan.
22. In the above background the main issue raised by the Applicant No. 1 for seeking substitution of Applicant No. 2 in the Resolution Plan is the delay and uncertainty in obtaining permission from RBI. To substantiate the above, the Applicants as also the Ld.Counsel for the Monitoring Committee highlighted the various efforts made for obtaining the permission of the RBI and the requirement under the Resolution Plans for implementation of the Resolution Plan. In this context, we may notice the process stipulated under the Code for submission and approval of Resolution Plan. As per Section 30 (2) of the Code, the Resolution Professional shall examine each resolution plan received by him to confirm inter alia, that each resolution plan does not contravene any of the provisions of the law for the time being in force (Section

30 (2) (e)), and conforms to such other requirements as may be specified by the Board/IBBI. Further, the Committee of Creditors may approve a Resolution Plan by a vote of not less than sixty-six percent of voting share of the financial creditors, **after considering its feasibility and viability**. Thus, it is clear that it is a requirement under the Code to satisfy that the Resolution Plan does not contravene any of the provisions of the law for the time being in force and examination/satisfaction of feasibility and viability by the Resolution Professional and the Committee of Creditors is a pre-requisite for submission of the plan before the Adjudicating Authority for approval. The Resolution Plan has gone through the above process prescribed under the Code and satisfied the legal viability of the Resolution Plan which in any case is an integral part for the compliance of the above and forms part of the commercial wisdom of the CoC. Therefore, there is an intrinsic assumption that financial creditors are fully informed about the viability of the Corporate Debtor and feasibility of the proposed Resolution Plan.

23. Once the Resolution Plan goes through examination of viability and feasibility of the Resolution Plan, and compliance with respect to the provisions of law in force, it is not open to contend that there is an uncertainty with respect to the eligibility of Applicant No.1 to be a Resolution Applicant for submitting the Resolution Plan and/or implementation of the Resolution Plan. The Resolution Applicant being an Asset Reconstruction Company registered under the SARFAESI Act was fully aware of its position to submit a Resolution Plan under the Code. Hence, we do not consider the reasons stated in the application for change of Applicant No.1 are appropriate.
24. Even if we assume that the reasons stated by the Applicants are justifiable, the next issue arising for consideration is whether the provisions of the Code

and the Regulations permit change of Resolution Applicant after approval of the Resolution Plan. It is observed that there is a prescribed procedure for inviting expression of interest, conducting due diligence on the prospective resolution applicants including compliance of provisions of Section 29A, issue of provisional list of eligible prospective resolution applicants, publication of final list of prospective resolution applicants, issue of request for Resolution Plan etc. The detailed procedure is prescribed with the intent to provide equal opportunity to the public at large and follow a transparent process in the submission of the Resolution Plan. In the process, the eligibility of the Resolution Applicant as also the other requirements are to be met by the Resolution Applicants for submission of the Resolution Plan. Thus, it is clear that the statutory framework laid down under the Code and the Regulations provide a step by step procedure which would be circumvented in case the Applicant No.1 is allowed to substitute Applicant No.2 in the Resolution Plan at this stage.

25. It is also a settled position of law that once the resolution plan is approved by the Committee of Creditors, and submitted to the adjudicating authority, the successful resolution applicant cannot withdraw or modify the resolution plan. In the present case, the resolution plan has also been approved by the Adjudicating Authority. The Hon'ble Supreme Court in the case of Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited and Another (Civil Appeal No,3224 of 2020) held at para 153 as under:

'Regulation 38 (3) mandates that a Resolution Plan be feasible, viable and implementable with specific timeline. A Resolution Plan whose implantation can

be withdrawn at the behest of the successful Resolution Applicant, is inherently unviable, since open-ended clauses on modifications/withdrawal would mean that the plan could fail at an undefined stage, be uncertain, including after approval by the Adjudicating Authority. It is inconsistent to postulate, on the one hand, that no withdrawal or modification is permitted after the approval by the Adjudicating Authority under Section 31, irrespective of the terms of the Resolution Plan; and on the other hand, to argue that the terms of the Resolution Plan relating to withdrawal or modification must be respected, in spite of the CoC's approval, but prior to the approval by the Adjudicating Authority. The former position follows from the intent, object and purpose of the IBC and from Section 31, and the latter is disavowed by the IBC's structure and objective. The IBC does not envisage a dichotomy in the binding character of the Resolution Plan in relation to a Resolution Plan on a Resolution Applicant, who is the proponent of the Plan which has been accepted by the CoC cannot remain indeterminate the discretion of the Resolution Applicant. The negotiations between the Resolution Applicant and the Coc are brought to an end after the CoC's approval. The only conditionality that remains is the approval of the Adjudicating Authority, which has a limited jurisdiction to confirm or deny the legal validity of the Resolution Plan in terms of Section 30(2) of the IBC. If the requirements of Section 30 (2) are satisfied, the Adjudicating Authority shall confirm the Plan approved by the CoC under Section 31 (1) of the IBC.'

26. The Counsel for the Applicants argued that there is no modification/withdrawal of the Resolution Plan by the Applicant No.1 and the commercial terms remain the same without any change, and further that the need for replacement of Applicant No.1 in the Resolution Plan has arisen on account of the delay and uncertainty in granting approval by the RBI. In this connection, it is observed that the Hon'ble Supreme Court in the case of

Committee of creditors of Amteck Auto Ltd v. Dinkar T. Venkatasubramanian & Ors; Civil Appeal No. 6707 of 2019 had curbed an attempt by a successful Resolution Applicant who had relied on a force majeure clause in its Resolution Plan to seek a direction compelling the CoC to negotiate a modification to the Resolution Plan. The Hon'ble Court held that there is no scope for negotiation between the parties once the Resolution Plan has been approved by the CoC. In this case, the situation is slightly different in the sense the implementation of the approved Resolution Plan, in the absence of RBI approval, may break down or be found to be incapable of performance, though the Resolution Applicant is ready and willing to implement the Resolution Plan. Hence, the question is whether the implementation of the Resolution Plan can be saved by the Adjudicating Authority by allowing substitution of the Resolution Applicant, particularly when no other Resolution Applicant appears to have come forward with a resolution plan during CIRP.

27. The Hon'ble Supreme Court in the case of *Ebix Singapore (supra)* while considering a similar situation held:

“157. Based on the plain terms of the statute, the Adjudicating Authority lacks the authority to allow the withdrawal or modification of the Resolution Plan by a successful Resolution Applicant or to give effect to any such clauses in the Resolution Plan. Unlike Section 18(3) (b) of the erstwhile SICA which vested the Board for Industrial and Financial Reconstruction with the power to make modifications to a draft scheme for sick industrial companies, the Adjudicating Authority under Section 31(2) of IBC can only examine the validity of the plan on the anvil of the grounds stipulated in Section 30(2) and either approve or reject the plan.

The Adjudicating Authority cannot compel a CoC to negotiate further with a successful Resolution Applicant. A rejection by the Adjudicating Authority is followed by a direction of mandatory liquidation under Section 33. Section 30(2) does not envisage setting aside of the Resolution Plan because the Resolution Applicant is unwilling to execute it, based on terms of its own Resolution Plan.

158. *Further, no such power can be vested with the Adjudicating Authority under its residuary jurisdiction in terms of Section 60(5) (c). In a decision of a three judge Bench of this Court in Gujarat Urja (supra), it was held that, “the NCLT’s residuary jurisdiction [under Section 60(5)(c)] though wide, is nonetheless defined by the text of the IBC. Specifically, the NCLT cannot do what the IBC consciously did not provide it the power to do”. Further, the court observe that “this Court must adopt an interpretation of the NCLT’s residuary jurisdiction which comports with the broader goals of the IBC”. The effect of allowing the Adjudicating Authority to permit withdrawals of resolution plans that are submitted to it, would be to confer it with a power that not envisaged by the IBC and defeat the objectives of the statute, which seeks a timely and predictable insolvency resolution of Corporate Debtors.”*

28. Having due regard to the law settled by the Hon’ble Supreme Court, we are of the view that there is no explicit provision under the Code permitting replacement of Resolution Applicant, and in the absence of any provision under the Code, allowing replacement of Resolution Applicant would be impermissible. The specific problem of incapability of implementation of Resolution Plan, in the absence of regulatory approvals, can be remedied only if permitted by the Code.

29. As regards the submission of the Applicants that some of the assets such as equipment and machine of the Corporate Debtor have a high rate of obsolescence and many such equipment/machinery is lying idle from February, 2018 i.e. from the date of filing of the Insolvency Application and that Resolution Plans aim to monetise other identified assets such as real estate, towers etc, it was submitted that such steps towards monetisation of assets can only be taken from the Effective Date under the Resolution Plan which is five business days from the grant of approval of RBI. In the circumstances, the Senior Counsel also expressed urgency in implementation of the Resolution Plans.
30. At the same time, the Senior Counsel was upright in admitting that a larger issue regarding the transfer/use of the right to use spectrum of the Aircel Entities is pending consideration before the Hon'ble Supreme Court. As such, the implementation of the approved Resolution Plans can only happen as and when the Hon'ble Supreme Court decides this issue in favour of the Applicant No. 1 and the lenders to the Aircel Entities. It is also not out of place to observe that the Approval Order dated 09.06.2020 has also been impugned before the Hon'ble NCLAT in several appeals filed by creditors of the Aircel Entities which are currently pending consideration. In view of the pending litigations before the Hon'ble Supreme Court and Hon'ble NCLAT, it appears that the Resolution Plan has not reached the stage of implementation.
31. Based on the above discussion, we are of the view that the specific problem of incapability of implementation of Resolution Plan, without necessary approval from RBI, cannot be remedied by substitution of the Resolution Applicant, and in the absence of specific provision in the Code, the Adjudicating Authority lacks the authority to allow modification of the

Resolution Plan to substitute the Resolution Applicant. In the circumstances, the present Interim Application is liable to be dismissed.

32. In the result, **IA No.1403 of 2022 is dismissed.**

Sd/-

**ANIL RAJ CHELLAN
(MEMBER TECHNICAL)**

Sd/-

**KULDIP KUMAR KAREER
(MEMBER JUDICIAL)**